A **SATRIADESA CORPORATION SDN BHD**

v.

TENAGA NASIONAL BHD

B HIGH COURT MALAYA, KUALA LUMPUR
PRASAD SANDOSHAM ABRAHAM JC
[SUIT NO: S22-759-2009]
10 DECEMBER 2009

C ***BANKING:*** *Securities for advances - Performance bond - Application by plaintiff seeking an injunction restraining defendant from calling on performance bond issued by bank - Construction of language of bond - Whether bond may not be an unconditional "on demand" bond - Interests of justice - Whether intervention required even where fraud not pleaded -*
D *Status quo, preservation of*

CONTRACT: *Performance bond - Injunction - Application by plaintiff seeking an injunction restraining defendant from calling on performance bond issued by bank - Construction of language of bond - Whether bond*
E *may not be an unconditional "on demand" bond - Interests of justice - Whether intervention required even where fraud not pleaded - Status quo, preservation of*

CIVIL PROCEDURE: *Injunction - Call on performance bond - Application by plaintiff seeking an injunction restraining defendant from*
F *calling on performance bond issued by bank - Construction of language of bond - Whether bond may not be an unconditional "on demand" bond - Interests of justice - Whether intervention required even where fraud not pleaded - Status quo, preservation of*

G This was an application by the plaintiff seeking an injunction restraining the defendant from calling by way of demand on the performance bond issued by one Malayan Banking Bhd. The plaintiff and the defendant had entered into an agreement wherein the defendant had appointed the plaintiff to design, build and
H complete the construction of a store complex ('said project'). Among the salient terms of the agreement was that the plaintiff was to furnish a performance bond for a value of RM517,062 as security to the defendant in the event the plaintiff failed to complete the works under the said project. Although it was the plaintiff's case that
I it had completed all works envisaged under the said project

according to schedule, the defendant, asserting that the plaintiff had breached its contractual obligations, proceeded to call on the performance bond. Hence, the present application by the plaintiff.

Held (allowing the application):

(1) In law, a bank's obligation is to pay on demand in bonds which by their nature are immediate and unconditional, save and except in cases where fraud is alleged. However, in this instance there was a need to examine the bond in question. There were two parts to this bond that were covered as per the language used: "the contractor fails to perform and observe all terms, provisions, conditions and stipulations of the contract on the contractor's part to be performed and observed according to the true purport, intent and meaning thereof or if in default by the contractor". The defendant's letter of demand calling on the bond clearly relied on the first part of the bond. However, despite the "on demand" flavour of the bond in terms of language, there was an issue that the qualifying words "true purport, intent and meaning thereof" could possibly be construed to mean that this may not be an unconditional "on demand" bond, or at the very least it posed a serious issue to be tried in terms of the construction of the language of the bond and whether a demand *simpliciter* would attract liability. It was clear that the plaintiff did not plead any elements of fraud and it thus followed that an injunction should not ensue to prevent a claim on the performance bond by the defendant *per se.* However, having looked at all the surrounding circumstances, the interests of justice called for this court to intervene even where fraud was not pleaded. In light of the facts of this case and the relevant principles applicable, an injunction ought to be granted in order to preserve the *status quo* and to prevent irretrievable injustice. *Teknik Cekap Sdn Bhd v. Public Bank* (foll); *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* (foll); *Elian and Rabbath (trading as Elian and Rabbath) v. Matsas and Matsas; JD Mclaren and Company Ltd and Midland Bank Ltd* (foll); *Keet Gerald Francis Noel John v. Mohd Noor & Ors* (foll). (paras 9, 11, 12, 13 ,14, 15 & 16)

Case(s) referred to:

Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd [1995] 1 CLJ 283 SC ***(foll)***

Keet Gerald Francis Noel John v. Mohd Noor & Ors [1995] 1 CLJ 293 CA ***(foll)***

Royal Design Studio Pte Ltd v. Chang Development Pte Ltd [1990] 1 LNS 124 ***(refd)***

Teknik Cekap Sdn Bhd v. Public Bank [1995] 4 CLJ 697 CA ***(foll)***

The Radio & General Trading Co Sdn Bhd v. Wayss & Freytag (Malaysia) Sdn Bhd [1997] 1 LNS 400 ***(refd)***

Other source(s) referred to:

Lloyds Law Reports, 1966, vol 2, p 495

For the plaintiff - Keith Kwan; M/s Mohd Zain & Co
For the defendant - Shanti Subramaniam; M/s Belden

Reported by Suresh Nathan

JUDGMENT

Prasad Sandosham Abraham JC:

[1] I disposed of the plaintiff's application in encl. 3 and granted an order in terms, restraining the defendant from calling by way of demand on the performance bond issued by Malayan Banking Berhad (the said bank). I allowed the application on 10 November 2009 and below are hereinafter set out, my reasons for so doing.

[2] The relevant facts are that the plaintiff and the defendant entered into an agreement dated 10 October 2006 wherein the defendant appointed the plaintiff and the plaintiff agreed to carry out and complete the works to design, build and complete the construction of a store complex (TEKNIKAL) Kuala Lumpur/ Timor/Kuala Lumpur – "Pusat dan local warehouse" on Lot 11553 Mukim Hulu Kelang, Daerah Gombak, Selangor Darul Ehsan (hereinafter referred to as the said project) upon the terms and conditions and for the consideration set out in the aforesaid agreement, (the said agreement).

[3] Among the salient terms of the said agreement, the plaintiff was to furnish a performance bond for a value of RM517,062 as a Security to the defendant in the event the plaintiff failed to complete the works under the said project. The other salient terms

of the said agreement was that the plaintiff was to carry out the project according to the mode, specifications and/or the schedule set out in the said agreement.

[4] It was also further agreed that the said project was to be completed within 18 months and delivery of the site in respect of the said project by the defendant to the plaintiff was 12 May 2008. It was also to be noted that the contract binding on both the plaintiff and the defendant was the form of tender which was subject to exhaustive written contract document to follow.

[5] It is the plaintiff's case that they completed the works according to schedule and all works envisaged under the said project were completed. The plaintiff had obtained the relevant approval from the fire department (PASIF) on 13 August 2008 and the Certificate of Fitness to occupy the store from Majlis Perbandaran Ampang Jaya (MPAJ) on 3 December 2008. An independent professional engineer had signed the Borang E for the issue of the CF which was eventually issued on 13 December 2008. On 11 August 2008, the plaintiff carried out a site inspection with the attendance of the defendant and/or its representatives of the project works completed by the plaintiff but the defendant refused to accept delivery of the site of the said project works until 24 June 2009 and 16 September 2009 respectively. The defendant has refused to issue "Sijil Penyerahan Hak taking over certificate" ie, Certificate of Practical Completion.

[6] The defendant on 11 August 2009 (and the plaintiff contends wrongfully) issued a call on the performance bond to Malayan Banking Berhad for the total bond value of RM517,062.50 as the said bond was to expire on 13 November 2009. It was later agreed between the plaintiff and the defendant the said bond was to be extended from 13 November 2009 to 12 May 2011 and the defendant agreed to withdraw its demand on the bond. The defendant had made it clear in its correspondence with the plaintiff that it retained the right to proceed to call on the Bond which it did again on 14 October 2009 by way of a fresh call on the performance bond. The plaintiff maintains the defendant is indebted to the plaintiff in the sum of RM517,036 for the value of work done by the plaintiff which has not been paid by the defendant. The defendant denies the same.

[7] I have examined the facts presented by the defendant. The defendant quite simply asserts the plaintiff was in breach of its contractual obligations. The defendant has succinctly set out the alleged breaches in Annexure A to their written submissions. The defendant maintains the plaintiff did not complete the works within the stipulated time but a year later. In fact in exh. RM3 of encl. 6A, the defendant's affidavit, the defendant makes reference to this uncompleted work. It was further submitted that this letter was not disclosed to the court earlier. The defendant had recorded the plaintiff's partial completion and handover of works in two steps ie, 29 September 2009 and 16 September 2009 (RM4 encl. 6A).

[8] The defendant contends further the plaintiff has glossed over its position in that the defendant refused to accept/take delivery of the said works until the plaintiff completes or rectifies the substantial defects in the works (exh. RM5 encl. 6A, Clause 10.1 FIDIC Conditions of Contract). The defendant also maintains the plaintiff has been made aware of structural cracks running through the floors of the store which had to be addressed first. The defendant had also asserted the defendant's acceptance of handover of works being conditional upon an independent engineer verifying that the cracks had been satisfactorily remedied. The defendant had just appointed this Consultant on 9 September 2009 (RM9 encl. 6A) and the cost of the same would amount to RM39,692 and that the plaintiff was obliged in law to pay the said cost which entitles the defendant to call upon the bond. The defendant further contends that the plaintiff had incurred damages for the delay in the sum of RM1,084,274.43 (LAD). This further necessitates a call on the bond by the defendant, as submitted by counsel for the defendant.

[9] I accept the position in law that a bank's obligation is to pay on demand in bonds which by their nature are immediate and unconditional save and except in cases where fraud is alleged. However, I am of the view there is a need to examine the bond in question. There are two parts to this bond that are covered as per the language used, "the contractor fails to perform and observe all terms, provisions, conditions and stipulations of the contract on the contractor's part to be performed and observed according to the true purport intent and meaning thereof or if in default by the contractor". The defendant's letter of demand calling on the bond appears in p. 4 of encl. 6A is clearly relying on the first part of the

bond. It is my view that despite the on demand flavour of the bond in terms of language, there is an issue that the qualifying words "true purport, intent and meaning thereof" could possibly be construed that this may not be an unconditional on demand bond or at the very least it poses a serious issue to be tried in terms of the construction of the language of the bond and whether a demand simpliciter would attract liability. See the case of *Teknik Cekap Sdn Bhd v. Public Bank* [1995] 4 CLJ 697. Per Shaik Daud bin Mohd. Ismail JCA: "A performance bond is merely a written guarantee, and in order to interpret that obligations inherent thereunder, one has only to look at the bond. In interpreting performance bonds, however, a strict approach ought to be applied, and hence, in making demands on them the beneficiary must strictly adhere to the terms."

[10] The Supreme Court in *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* [1995] 1 CLJ 283, in the case of an unconditional on demand bond, the approach to be taken was similar in terms as to that of an interlocutory injunction similar in terms to encl. 3 bearing in mind the bank itself Malayan Banking Berhad was not being sought to be injuncted. There are in this case several serious issues to be tried and this court would not at this stage descend into adjudicating on each of these issues. However, the court will endeavour to set out briefly the issues that have arisen in this dispute.

i. The plaintiff claims they have completed the contract works and all defects have been remedied which is denied by the defendant.

ii. Was the plaintiff entitled to the sum of RM517,036 for value of work done by the plaintiff or was the plaintiff liable for liquidated damages as claimed by the defendant.

iii. The position of the structural defects (which is denied by the plaintiff) and the appointment of the independent Consultant Engineer by the defendant to confirm the defects have been remedied and whether the cost of the independent consultant engineer should be borne by the plaintiff.

[11] It is clear there are no elements of fraud pleaded by the plaintiff and it therefore follows that an injunction should not ensue to prevent a claim on the performance bond by the defendant *per*

A *se*. However having looked at all the surrounding circumstances, the interest of justice calls for the intervention of this court even where fraud is not pleaded. In this regard, reference is made to the case of *Elian and Rabbath (trading as Elian and Rabbath) v. Matsas and Matsas; JD Mclaren and Company Ltd and Midland Bank Ltd*, a B decision of the Court of Appeal, United Kingdom reported in Lloyds Law Reports 1966 Vol. 2 at p. 495. It was held by the Court of Appeal that this was a special case in which the court should grant an injunction to prevent what might be irretrievable injustice.

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[12] If an injunction was not granted, it would mean the plaintiff would be in a position of default with the bank as the bank would have paid out the monies before the issues between the plaintiff and the defendant could be resolved and the plaintiff would be D exposed to a possible suit from the bank being in the position of a defaulter. If the plaintiff is correct that it is owed monies by the defendant which amounts to close to that of the value of the bond, the plaintiff would suffer irreparable damage even if successful at trial. I make reference to the case of *The Radio & General Trading* E *Co. Sdn Bhd v. Wayss & Freytag Malaysia Sdn Bhd* [1997] 1 LNS 400 where it was held by the High Court the sole consideration in an application for injunctions restraining payment is the existence of fraud or unconscionability. Further it was held "the defendant would not be unduly prejudiced by the grant of the injunction as the F subject matter at issue was a performance bond issued by a bank. If the arbitration decides that the defendant was entitled to the bond, payment can still be made. The only damage suffered by the defendant would be the loss of the use of the monies secured by the bond or whatever was due to the defendant, which can be recovered G by a civil action. If the injunction was not granted the bank would be obliged to pay the debt and recover the same from the plaintiff who in turn can only recover from the defendant after the arbitration proceedings was concluded. Reference is also made to the case of *Royal Design Studio Pte Ltd v. Chang Development Pte Ltd* H [1990] 1 LNS 124 where the High Court in Singapore held there was no reason why this court could not exercise its equitable jurisdiction in restraining the defendant from calling on the bond. It is also to be noted from the facts the bond has been renewed by the plaintiff at the request of the defendant to 2011.

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[13] The defendant had raised the issue of the cracks and other defects which the defendant claimed the plaintiff had not rectified. However, the defendant only appointed the said independent consultant on 9 September this year to look into the matter of the defects and is yet to have commenced work. Yet the defendant rushed into making a demand on the bond. What if the independent consultant in his report says all defects have been rectified? Therefore the rush to make a call on the bond shortly after it had been renewed by the plaintiff at the request of the defendant is conduct that could be construed as unconscionable. At any rate this conduct warrants further investigation.

[14] The bond's expiry date has been renewed and the defendant's right to call on the same is secured. On the other hand if the call is allowed, the plaintiff would be put in financial jeopardy and the reputation of the plaintiff would be at stake. The defendant had submitted the plaintiff has not averred sufficiently on that point but looking at paras 28 & 29 of encl. 3A ie, the affidavit of the plaintiff in support of encl. 3, the point has been sufficiently raised.

[15] The defendant avers that they are the biggest utility company in Malaysia and would be more than capable in meeting any claim for damages (See *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* [1995] 1 CLJ 283 SC). However, in the Court of Appeal decision in *Keet Gerald Francis Noel John v. Mohd Noor & Ors* [1995] 1 CLJ 293 the Court of Appeal held having found that an issue has been disclosed that requires further investigation, "he must consider where the justice of the case lies. He must take into account all relevant matters, including the practical realities of the case before him and weigh the harm the injunction would produce by its grant against the harm that would result from its refusal."

[16] In the light of the aforesaid, and in order to preserve the *status quo* and to prevent irretrievable injustice, I made an order in terms of encl. 3.